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NOTES OF INDIAN CASES.

HERAMBACHANDRA MAITRA *v.* JYOTISHCHANDRA SINGHA, I. L. R. 59 Cal. 501.

In this case, a purchaser's suit for specific performance was decreed but the plaintiff failed to deposit the purchase money into Court as provided in the decree and the defendant vendor applied to execute the decree and enforce the payment of the money by the plaintiff which was ordered by the learned Judges. This is the first case in this country, where the question of the position of the defendant in a suit for specific performance has been fully discussed after a review of the authorities and it has been held that a decree for specific performance enures for both the parties and that consequently each one of them is entitled to execute the decree as against the other with a view to fully carry out the agreement. This position seems to have been well recognised in England both in the leading text-books and in the forms of judgments. *See* Fry's Specific Performance, 6th edition, § 1171 *et seq.* and Halsbury's Laws of England, Vol. 27, p. 96, § 169, where it has been said that *either party* can avail himself of the reliefs after the judgment for specific performance.

Indeed, even when the action for specific performance at the instance of the vendor is dismissed for want of title, the defendant-purchaser is in the same action given a return of the deposit and the costs. *See* Seton on Judgments and Orders, pp. 2177 and 2187. *Cf.* also In re *S. S. Shirke*[1]. It must, however, be mentioned that in the decisions referred to by Sir Edward Fry and in Halsbury's Laws of England, i. e., *Morley* v. *Clavering*[2] and *Morgan* v. *Brisco*[3], the application was only made by the plaintiff and not by the defendant. The same view of the nature of decrees for specific performance has been taken by the Madras High Court in *Abdul Shaker Sahib* v.

1. (1931) 33 Bom. L. R. 1177. 2. (1861) 30 Beav. 108.
3. (1885) 31 Ch. D. 216.

Abdul Rahiman Sahib[1] where Sir Walter Schwabe, C. J., observed that after the original judgment for specific performance it is the definite practice in England that all consequential reliefs by reason of any party failing to comply with the terms of the judgment must be sought by application to the Court by which the judgment was passed. The whole question has been fully examined recently by the Madras High Court in C. R. P. No. 1112 of 1929 (not yet reported) where the learned Judges have followed the decision under notice. A short note of this case has appeared in 63 M.L.J. (Notes of Recent Cases), p. 47.

It must, however, be mentioned that it is not clear whether the decree in a suit for specific performance is of a preliminary nature or final and whether the enforcement of the rights of the parties is by an application in the suit which must be considered to be still pending or by execution of the decree treating it as final. The consideration of this question is somewhat difficult as the Civil Procedure Code has made no specific reference to this class of decrees and no form has been prescribed for the same. O. 21, R. 32 of the Code which provides for the enforcement of decrees for specific performance does not seem to throw much light on the question as it has only reference to the punitive procedure of contempt and not for the discharge or the satisfaction of the decree. See *Ahmadi Begam* v. *Amanat Husain*[2]. The rules of O. 20 and O. 34 of the first schedule of the Civil Procedure Code provide for preliminary decrees in some classes of cases of which specific performance is not one. In England, all such consequential reliefs are obtained in the action itself and not in execution and liberty to apply is ordinarily reserved in the original judgment. The Bombay High Court in *Bai Karimabibi* v. *Abderehman*[3] seems to take the view that the decree is final in its nature and the further remedy is in execution of the same and it has been held that the defendant also is a decree-holder within the meaning of S. 2 (3) of the Code. The learned Judges in the decision under notice are inclined to the same view. The Madras High Court in *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib*[1] and in C. R. P. No. 1112 of 1929, referred to above, seem to take the view that the decree is preliminary in its nature and that further relief might be had in the suit itself. This uncertainty, it is submitted, can be set at rest by the High Courts making suitable rules under their rule-making power under the Code.

1. (1922) I. L. R. 46 Mad. 148: 44 M. L. J. 107.
2. (1904) 1 A. L. J. 431.
3. (1922) I. L. R. 46 Bom. 990.

THE BENARES BANK, LTD. *v.* HARI NARAIN, L. R. 59 I.A. 300: I. L. R. 54 All. 564: 63 M. L. J. 92 (P. C.).

In Hindu Law, business is regarded as heritable asset and such asset descending from an ancestor is a joint family asset and liabilities incurred in the carrying on of such a business would constitute a joint family liability for which family immoveable property can be alienated. This principle has no application to a trade business started for the first time by a manager or father, the propriety of which is to be tested by other considerations, and the Privy Council laid down in *Sanyasi Charan Mandal* v. *Krishnadhan Banerji*[1] that it was not within the competence of a family manager to start a new trade so as to make it a family trade with the necessary implications of such a trade, as to family liability. The case itself was a Dayabhaga case, but, as their Lordships point out in this case, the conclusion did not depend on anything peculiar to Dayabhaga and was therefore equally applicable to Mitakshara families. Some cases while recognising that that decision would govern the case of the ordinary manager held that the father's case stood on a different footing and that it would be open to him to start a new trade provided it was not a highly speculative one: *Rajagopal Pillai* v. *Veeraperumal Pillai*[2], *Venkatasami Naicker* v. *Palaniappa Chettiar*[3] and In the matter of *Radhakrishniah Chetty*[4]. In view of the decision in this case, that view would seem to be no longer sustainable. With that must also go the view that a trade might be treated as a family trade if the adult members consent to it expressly or impliedly: *Mahabir Prasad Misr* v. *Amla Prasad Rai*[5], *Tammi Reddi* v. *Gangi Reddi*[6], *Abdureheman Kutti Haji* v. *Hussain Kunhi Haji*[7] and *Lakshmiah* v. *The Official Assignee, Madras*[8]. It is not clear, however, whether the other distinction made in some of the cases between members of a caste or family whose profession or *kulachar* is trade and members of a non-trading family or caste is equally disapproved : *The Official Assignee of Madras* v. *Palaniappa Chetty*[9], In the matter of *Radhakrishniah Chetty*[4], *Mahabir Prasad Misr* v. *Amla Prasad Rai*[5],

1. (1922) L. R. 49 I. A. 108 : I. L. R. 49 Cal. 560 : 43 M. L. J. 41 (P. C.).
2. (1927) 53 M. L. J. 232. 3. (1928) I. L. R. 52 Mad. 227: 56 M.L.J. 380.
4. (1924) 19 L. W. 415. 5. (1924) I. L. R. 46 All. 364.
6. (1921) I. L. R. 45 Mad. 281 : 42 M. L. J. 570.
7. (1919) I. L. R. 42 Mad. 761 : 37 M. L. J. 316.
8. 1928 M. W. N. 576.
9. (1918) I. L. R. 41 Mad. 824 : 35 M. L. J. 473.

Damodaram Chetty v. *Bansilal Abeerchand*1 and *Venkatasami Naicker* v. *Palaniappa Chettiar*2. The test according to these cases is whether having regard to the recognised business, profession, means of livelihood or what is called the *kulachara* of the family, the particular enterprise is only within the reasonable limits of the exercise thereof or really having regard to its nature, a speculative enterprise: *Damodaram Chetty* v. *Bansilal Abeerchand*1 and *Raghunathji Tarachand* v. *The Bank of Bombay*3. Authority is found for the position in the text of Yajnavalkya "among herdsmen, vintners, divers, washermen and hunters, the husband shall pay the debt of his wife" because his livelihood depends upon her. "Stri" in the stanza is stated by Mr. Justice Chandavarkar to be taken in Balambhatti as an upalakshana for "manager of the family". The text itself would seem only to point to its being upalakshana for women of other classes such as Brahmans when they depend for their livelihood on their wives. Anyway, the authority of this text would only go so far as to justify the conclusion that "where a family carries on a business or profession and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts". Such a case might come within the definition of necessity as propounded by Vijnaneswara in verses 27 to 29, by which alone the question has, according to their Lordships, to be decided. The case must be one where the pursuit of the trade is "necessary for the support of the family". See *Babaji Mahadaji* v. *Krishnaji Devji*4 cited in *Kameswara Sastri* v. *Veeracharlu*5, *Mahesh Prasad* v. *Jagannath*6 and *Inspector Singh* v. *Kharak Singh*7. Where it cannot be predicated that it is necessary "for the support of family" though the trade might be the profession of the caste it might not be justifiable. Their Lordships would seem to approve the view taken in *Inspector Singh* v. *Kharak Singh*7 where reference is made to the verses in the Mitakshara, and the conclusion against the power of the manager to start a new trade is based upon them. In *Damodaram Chetty* v. *Bansilal Abeerchand*1 it was held that the mere fact that the trade had stopped for some time during the grandfather's lifetime and was subsequently continued by the father, or that

1. (1925) I. L. R. 54 Mad. 711 at 719: 55 M. L. J. 471
2. (1928) I. L. R. 52 Mad. 227: 56 M. L. J. 380.
3. (1909) I. L. R. 34 Bom. 72 at 79. 4. (1878) I. L. R. 2 Bom. 666.
5. (1910) I. L. R. 34 Mad. 422 at 424 : 20 M. L. J. 855.
6. A. I. R. 1931 All. 743. 7. (1928) I. L. R. 50 All. 776.

there was variation in the kind of commodity sold, would not make it a new trade. Cf. *Subramanya Chetty* v. *Ramakrishnammal*[1]. Nor does the fact that a stranger partner retires from the business and accounts were taken for the purpose of settling his claims or that the name was changed make it a new business nor even the fact that subsequently speculative transactions were entered into: *Sri Thakur Ramkrishna Muraji* v. *Ratan Chand*[2]. The decision in this case applies only to alienations for debts contemporaneously incurred and not to alienations for antecedent debts. The pious obligation of the son extends to commercial debts incurred by the father though the trade is one started by him: *Achutharamaiya* v. *Ratnajee*[3], *Venkatasami Naicker* v. *Palaniappa Chettiar*[4], *Annabhat Shankarbhat* v. *Shivappa Dundappa*[5] and *Bal Rajaram Tukaram* v. *Maneklal Mansukhbhai*[6] and an alienation for such debts would bind the son. Nor would the decision exclude the application of the principle that a person cannot take the benefit of the trade accretions without bearing the burden. See *Subramanya Chetty* v. *Ramakrishnammal*[1], *Burrayya* v. *Ramayya*[7] and *Ganesa Iyer* v. *Amirthaswami Odayar*[8]. These cases, however, must not be taken to support the position that the carrying on of an ancestral trade, *e.g.*, the carrying on the father's trade which itself is not justifiable under the rule would in all circumstances be justifiable once the father is dead without reference to the nature of the business or the credit and debit side of the business

CHANDUKCHAND *v.* VEDACHALA CHETTIAR, I. L. R. 55 Mad. 549 : 62 M. L. J. 180.

The somewhat wide and careless language of S. 73, cl. (2) of the Madras Hindu Religious Endowments Act (II of 1927) has given rise to contentions such as those that fell to be decided in *Vythilinga Pandara Sannadhi* v. *Temple Committee, Tinnevelly Circle*[9] and in this case. In the former, it was contended that a declaration as to the hereditary right of trusteeship was barred by this section. That question might

1. 1924 M. W. N. 794.
2. (1931) L. R. 58 I. A. 173: I. L. R. 53 A. 190: 61 M. L. J. 665 (P. C.).
3. (1925) I. L. R. 49 Mad. 211 : 50 M. L. J. 208.
4. (1928) I. L. R. 52 M. 227: 56 M. L. J. 380.
5. (1928) I. L. R. 52 Bom. 376.
6. (1931) I.L.R. 56 Bom. 36.
7. (1923) I. L. R. 47 Mad. 449 : 46 M. L. J 49.
8. 1918 M. W. N. 892.
9. (1931) I. L. R. 54 Mad. 1001: 61 M. L. J. 815.

possibly get mixed up with the question of as to whether a temple is an excepted temple and might thus indirectly be capable of adjudication by the Board and ultimately by the Court by the machinery provided by the Act. But heaps of occasions might arise when the question of hereditary right of trusteeship might be wholly unconnected with that question, and thus be incapable of decision by the methods provided by the Act. It might arise independently of any questions such as those contemplated by Ss. 92 and 93, Civil Procedure Code. The adoption of the wide construction contended for would have barred suits in respect of the right without any other suitable machinery provided for their determination. The power of superintendence conferred by S. 19 of the Act could hardly be the substitute provided for the determination of such questions. The objections to the adoption of the wide construction contended for so as to include those cases appear in stronger relief in connection with the matter that arose for determination in the case under review. Here the suit was by a trustee to recover properties improperly alienated by previous trustee. To such a suit neither Ss. 92 and 93 of the Civil Procedure Code nor O. 1, R. 8 has been applied at any time. The Act itself does not provide any method for the recovery of the property unless S. 78 is read very widely so as to include such cases. Even so, cases where the trustee that alienated is still in office or where the trustee is a hereditary trustee would remain unprovided for. Suit by worshippers under O. 1, R. 8 would be swept away by S. 73 without leaving any other remedy available. There are two ways of avoiding the anomaly. One is to restrict the bar to suits that appropriately fall under S. 92 or 93 ; the other to read cl. (*i*) as covering all suits relating to temple administration whether they fall within S. 92 or not. The latter would involve the reading of the section in a manner opposed to the decision of the Privy Council in *Abdur Rahim* v. *Mahomed Barkat Ali*[1] and so far as one can see, does not involve any definite advantage over the old method of suit in ordinary Courts. For so long as S. 92, Civil Procedure Code, stands as at present, the suit under S. 92 cannot include a claim in respect of an unauthorised alienation and a separate suit would be necessary. One advantage there might be in such a course, *viz.*, all the suits relating to the administration of the temple will be in the same Court, the suit relating to scheme or accounts and the suit relating to alienations.

1. (1927) L. R. 55 I. A. 96 : I. L. R. 55 Cal. 519 : 54 M. L. J. 609 (P. C.).

BHAGAVATULLA KRISHNA RAO *v.* MUNGARA SANYASI, I. L. R. 55 Mad. 601 : 62 M. L. J. 313.

The estoppel of a tenant continues till he gives up possession to the landlord: *Bilas Kunwar* v. *Desraj Ranjit Singh*[1]. If he gives up possession to another that other is barred by the same estoppel even though that other is the true owner. *Pasupati* v. *Narayana*[2]. To both branches of the rule, eviction by title paramount seems to present an exception. For this purpose, it is not necessary that the tenant should actually go out of possession unless he claims to be entitled to possession in his own right ; it is sufficient if there is a threat of eviction and the tenant, in consequence of such a threat, attorns to the claimant, *see* Halsbury's *Laws of England*, Vol. 18, p. 480, but unless he comes to an arrangement with the person who has title he cannot set up such title. *See* Halsbury's *Laws of England*, Vol. 13, p. 404, *Mountnoy* v. *Collier*[3] and *Ram* v. *Pramatha*[4]. He must show a better title in a third person and also that he is defending on behalf of and with the authority of the third person. *Raja Bhawani Singh* v. *Maulvi Misbah-ud-din*[5]. On this principle, it would seem to follow that a mere decree for possession against the tenant would not amount to an eviction unless the decree is executed against him or on a threat of execution he attorns to the decree-holder. On the question as to in what circumstances a tenant without actually going out of possession can be said to be evicted by title paramount, there is considerable divergence of opinion. The question has arisen mainly with reference to Darkhast proceedings by Government. *Ammu* v. *Ramakishna Sastri*[6], *Ramakristna* v. *Subakka*[7], *Hattikudur Narain Rao* v. *Andar Sayad Abbas Sahib*[8] take one view. *Kunhunni Menon* v. *Sankaran Valia Raja*[9] takes in somewhat similar circumstances a different view. The former set of cases however would seem to be cases of really not eviction by adverse claimant but termination of title by the intervention of title paramount, *viz.*, Government as against the permissive occupants, the lessor and his lessee. See *Ammu* v. *Ramakishna Sastri*[6].

1. (1915) L. R. 42 I. A. 202: I.L.R 37 All. 557 : 29 M. L. J. 335 (P.C.).
2. (1889) I. L. R. 13 Mad. 335.
3. (1853) 1 E. & B 630.
4. (1921) 35 C. L. J. 146.
5. (1929) 56 M.L.J. 799 (P. C.).
6. (1879) I. L. R. 2 Mad. 226.
7. (1889) I. L. R. 12 Mad. 422.
8. (1914) 28 M. L. J. 44.
9. (1917) 24 M. L. T. 79.

The latter is really a case of adverse title. *Usman Koya* v. *Chidriamokkausa Akoth*[1] stresses the necessity for ouster. *Alaga Pillai* v. *Ramaswami Thevan*[2] is a case in which eviction was inferred from circumstances. In the case under review, there was an unexecuted decree for possession against the landlord and tenant. The question was whether the tenant could plead eviction by title paramount against the landlord seeking possession. It was rightly held that he could not for he had not gone out of possession or attorned to the decree-holder on threat of execution. It was argued in this case that the suit for ejectment itself operated as an ouster. That would have been right enough, for instance, if the decree had been for possession and mesne profits and had been executed and the question was as in *Ram* v. *Pramatha*[3] as to liability of the tenant for rent. The ouster in that case would have retroacted to the date of plaint so as to preclude the landlord from claiming rent for any period after the plaint. To give the plaint any higher value would have been to revive the technicalities of the English Law giving an artificial value to entry and assertion of claim which have been abolished by 3 & 4 William V, c. 27. Their Lordships further hold that the decision on the question of plaintiff's title was not binding as between the landlord and the tenant as they were co-defendants. This is open to question ; as it was the duty of the landlord to support his own title and secure the tenant's possession, a decree passed in his presence should certainly bind him. *Krishnan Nambiar* v. *Kannan*[4], *Muni Reddi* v. *Venkata Row*[5], *Thekkamannengath Raman* alias *Kochu Poduval* v. *Kakkasseri Pozhiyot Manakkal Karnavan*[6] which are unaffected by the decision of the Full Bench in *Secretary of State* v. *Syed Ahmad Badsha*[7]. Even so, the estoppel would have availed to the tenant only if he was evicted by the plaintiff or attorned to the plaintiff by reason of the judgment in the case.

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1. (1904) 15 M. L. J. 368. 2. (1925) 49 M L. J. 742.
3. (1921) 35 C. L. J 146. 4. (1897) I. L. R. 21 Mad. 8.
5. (1912) I. L. R 37 Mad. 238 at 250 : 23 M. L. J. 447 (F. B.).
6. (1915) 28 M. L. J. 184.
7. (1921) I. L. R. 44 Mad 778 : 41 M L. J. 223 (F. B).

NARASIMHA RAO *v.* NARASIMHAM, I. L. R. 55 Mad. 577 : 62 M. L. J. 436.

This case illustrates the danger of the incautious translation of the concepts of one system of jurisprudence in terms of the concepts of another system. The idea of property in the English system of jurisprudence differs radically from the idea of Swamya of Vignaneswara. He splits up the English concept of property into Swamya and Swatantrya and treats each separately as having distinct legal consequences. A father has in respect of his self-acquired property both Swamya and Swatantrya, while the son has only Swamya and no Swatantrya. He also conceives of a higher Swamya like that of the son and lower Swamya like that of the wife. In respect of ancestral property the father has Swamya along with the son, and Swatantrya of a limited character. The legal consequence of the theory is that in the case of self-acquisition the son is bound to accept the father's disposition. On the death of the father, however, the impotent Swamya develops into Swamya with Swatantrya, but the Swamya was all along there. If a partition takes place between the father and the sons, the sons take a share in the ancestral property by right, in the self-acquired property at the option of the father but both kinds of property get released from the son's claims once there is a partition. If one of the sons alone divides himself, the rest remaining joint with the father, he has no further claims on the property of the father of either kind while the claims of the others remain intact. The sons take the self-acquisition of the father as Apratibandha Daya and not as Sapratibandha Daya when the sons are undivided from the father. The sons divided from the father will not take it as Apratibandha Daya their rights thereto by birth being extinguished. *Nana Tawker* v. *Ramachandra Tawker*[1] held that the undivided sons take the self-acquired property of the father by survivorship and the divided son being incapable of so taking is excluded. This way of putting it was quite right if "property" was understood in the Mitakshara sense of Swamya. It is quite wrong if property was conceived in the English sense. The son was not a joint owner in the English sense. The Full Bench in *Vairavan Chettiar* v. *Srinivasachariar*[2] had to consider the question

1. (1908) I. L. R. 32 Mad 377.
2. (1921) I. L. R. 44 Mad. 499; 40 M. L. J. 481 (F. B.).

whether a son claiming the self-acquisition of the father on the latter's death was claiming "the effects of a deceased person by succession" within the meaning of S. 4 of the Succession Certificate Act and it was held that he was. Property to the disposition of which in any manner the son could not object and to the enjoyment of which he could lay no sort of legal claim could not, according to the English jurisprudence, be regarded other than the effects of the father and the claim thereto after the death of the father, other than a claim by succession, however they might be regarded according to theories of the Hindu Law. The concept of Swamya of Vignaneswara is quite foreign to the English jurisprudence and the right of the son, during the father's lifetime, whatever its basis, could only be regarded as a *spes successionis* during the father's lifetime, just like the claim of a successor to an impartible zamindary.

PANYAM *v.* RAMALAKSHMAMMA, I. L. R. 55 Mad. 581: 62 M. L. J. 187.

It was believed at one time that there was a dominant theory in Hindu Law that property once vested cannot be divested. But it could not but be recognised early that the Mitakshara system of joint family presented a challenge to this theory—it being nothing but a process of continual divestment. But this was regarded as an exception to the general rule. It was accordingly held that the subsequently born children of a disqualified member of the family may take a share if the family continues undivided but if once there is a partition or the coparcenary is terminated by the death of the last efficient member there could be no further divestment. This view was not accepted in Madras in *Krishna* v. *Sami*[1]. As pointed out there the Mitakshara contemplates divestment even after partition, *e. g.*, when the father reserves no share to himself and a son is born subsequently to him. Subsequent adoption to a coparcener by a widow was considered to be an analogous case. Adoption is on all hands admitted to be an exception to the general rule but it was thought that the general rule could be relaxed only so far as to justify the divesting of the widow in the case of a separate owner and the members of the coparcenary

1. (1885) I. L. R. 9 Mad. 64 (F. B.).

in the case of a coparcenary so long as the coparcenary existed. If the coparcenary came to a natural termination by the death of the last owner or to an artificial termination by partition, adoption could not divest the estate of the holder and it was also thought that the natural consequence of such a view was that adoption in those circumstances was also bad. If Madras took a consistent view it should have held that the right of the adopted son was unaffected by such intermediate vesting. In *Adivi Suryaprakasa Rao* v. *Nidamarty Gangaraju*[1] divestment was taken as the test of the validity of the exercise of the power of adoption and the adoption was held invalid. Divestment as a test has become untenable in view of the decisions of the Privy Council in *Madana Mohana Deo* v. *Purushothama Deo*[2] and *Pratapsing Shivsing* v. *Agarsingji Raisingji*[3]. As pointed out in the case under review, even *S. V. P. Raghunada Deo* v. *S. B. K. Patta Deo*[4] is an authority to the contrary as it is the case of an impartible estate and not of a joint family estate. The objections to the theory on principle are: (*i*) it makes what is accessory, *viz.*, devolution of property the main thing, (*ii*) the test suggested is unavailable in the case of joint families to which another test becomes necessary, (*iii*) a man may leave his property to the widow or a stranger partially or wholly, to which case, the theory would obviously be inapplicable, (*iv*) a man may have both joint family property and self-acquired property which may follow different courses the widow having neither vested in her, *e. g.*, when he leaves a widow and a son by another wife on the latter dying unmarried. The joint family property would survive to the family, the self-acquired property would go to the uncles or other sapindas, anyhow the widow getting neither. To such a case if the test applicable to joint family property is applied, the adoption would be valid; if the other test is applied, it would be bad. (*v*) It has not yet been held nor can it on principle be so held that intermediate holders can prevent by alienating the properties the adoption taking place (cf. *Veeranna* v. *Sayamma*[5]). In *Madana Mohana Deo* v. *Purushothama Deo*[2] a theory of fulfilment of the religious purposes of adoption has been suggested as the true basis. On the

1. (1909) I. L. R. 33 Mad. 228.
2. (1918) L. R. 45 I. A. 156: I. L. R. 41 Mad. 855; 35 M. L. J. 138 (P. C.).
3. (1918) L. R. 46 I. A. 97: I. L. R. 43 Bom. 778: 36 M. L. J. 511 (P.C.).
4. (1876) L. R. 3 I. A. 154: I. L. R. 1 Mad. 69 (P. C.).
5. (1928) I. L. R. 52 Mad. 398: 56 M. L. J. 401.

point as to whether attainment of ceremonial competency by the son for adoption is itself a termination of the authority there is a conflict in *Tripuramba* v. *Venkataratnam*[1] on one side and *Amarendra Mansingh Bhramarbar Rai* v. *Banamali Singh*[2], *Venkataramier* v. *Gopalan*[3], *Ananga Bhima Deo* v. *Kunja Bihari Deo*[4] on the other. The case under review holds following *Madana Mohana Deo* v. *Purushothama Deo*[5] (as reaffirmed in *Pratapsing Shivsing* v. *Agarsingji Raisingji*[6] and *Yadao* v. *Namdeo*[7]), that the fact that the property vested absolutely in some person other than the coparcenary is immaterial so long as the power is not exhausted and that the power is exhausted not by the property vesting in another but by the occurring of the contingency above referred to. The direct question was as to whether the power was terminated by the joint family property being partitioned by the members of the coparcenary and their Lordships hold that it is not. They leave open the question whether the power would not be at an end if the property descends by succession from the last coparcener to an heir of his by reason of the course of decisions to that effect (*see* on this point the latest decision of the Privy Council in *Bhimabai* v. *Gurunathgouda*[8]).

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1. (1922) I. L. R. 46 Mad. 423: 44 M. L. J. 349.
2. (1930) I. L. R. 10 Pat. 1.
3. (1918) 35 M. L. J. 698.
4. (1918) 25 M. L. T. 204.
5. (1918) L. R. 45 I. A. 156: I. L. R. 41 Mad. 855: 35 M. L. J. 138 (P. C.).
6. (1918) L. R. 46 I. A. 97: I. L. R. 43 Bom. 778: 36 M. L. J. 511 (P. C.).
7. (1921) L. R. 48 I. A. 513: I. L. R. 49 Cal. 1: 42 M. L. J. 219 (P. C.)
8. (1932) 64 M. L. J. 34 (P. C.).

NATHUNI THAKUR *v.* RAMSARAN SINGH, I. L. R. 11 Pat. 654 (S. B.).

This is an important pronouncement of the Special Bench dealing with the principles on which an enhancement of rent should be regulated under the sections of the Bengal Tenancy Act. The precise question that was raised for decision was whether in a suit for enhancement under S. 30 (*b*) of the Act the tribunal is entitled to take into consideration the great economic depression with reduction in staple food-crop prices which has taken place recently. The Full Bench held that under S. 35 of the Act the Court is bound to take the same into consideration and give effect to it even to the extent of denying any enhancement if as a result of the same, considered together with the proposed enhancement, there would be a disturbance of the proportion of the produce allotted to the landlord and the tenant respectively, measured in money value up to the time of suit. The Court is entitled to take judicial notice of the great economic convulsion and can ascertain its effect and extent from documents of public record and consider it along with the actual evidence that may be let in by a tenant as affecting his own particular case. The governing section of this whole group of sections is S. 35 and the expression "unfair and inequitable" therein is intended to refer to the maintenance of the proportion of the fixed produce between the landlord and tenant which is the basis of the rent paid by a raiyat to the landlord under the Indian system of landholding. The calculation of reasonable enhancement under the procedure laid in S. 32 of the Act may have to be corrected by the discretion to be exercised under S. 35, the main purpose to be kept in view being the maintenance of the proportion of the produce to be allotted to the parties. A further qualification may also be imported to the effect that the nett result should not be to reduce the raiyat's income calculated in terms of money to such an extent as to involve serious hardship. The above principles are stated in a forceful judgment by the Chief Justice with which the other four Judges agree. The analogous provisions of the Madras Estates Land Act are also to be interpreted in the same manner. More especially so as S. 35 of the Madras Act itself says that the rent cannot be enhanced so as to raise it beyond the value of the established waram of the village. The value of the judgment lies not so much in its applicability to the matters which

are governed by the Act in question or other similar Acts but because the principles stated are applicable even to enhancements and remissions of land revenue collected by the executive departments of the Government from ryotwari areas as in this presidency. The learned Chief Justice puts it in his judgment as follows: "The recent great and sudden economic change in the value, in terms of money, of foodstuffs is a notorious fact. A Court which declined to take judicial notice of it would, I imagine, serenely ignore an earthquake. Its effect in any particular case might be such as to render an enhancement (otherwise justifiable in the sense that the correct proportions are restored) unfair and inequitable because the money value of the proportion left to the raiyat might be so low as to involve serious hardship." These observations lose none of their force, when similar questions arise as between the Government and the landowners as regards land revenue payable to the Government, even where the incidence of it is not regulated by any Act of the Legislature.

KING-EMPEROR *v.* RAFI MIAN, I. L. R. 11 Pat. 669.

This judgment differs statedly from the view that has found favour with the Allahabad and Madras High Courts as regards the extent and scope of the High Court's powers and duty in a reference under S. 307 of the Code of Criminal Procedure. The Full Bench decision of the Madras High Court in In re *Veerappa Goundan*[1] holds that the verdict of the jury should be allowed to stand unless the High Court could hold that "the verdict is such that no reasonable man could have come to" or as it is otherwise expressed in other decisions that the verdict is manifestly perverse and unreasonable. The view of an earlier Division Bench that the High Court had a freer hand than even a Court of appeal in such cases and that the High Court should deal with it as if the case came before it in the capacity of a trying Judge, was definitely overruled. The preponderance of view in the Bombay and Calcutta Courts is in favour of the view that has been laid down by the Madras Full Bench. It has however been pointed out in a subsequent Madras decision, *Mottaya Pillai*, In re[2], by a bench that the Full Bench view may prevent a scrutiny even of misdirec-

1. (1928) I. L. R. 51 Mad. 956: 55 M. L. J. 591 (F. B.).
2. (1928) 56 M. L. J. 103.

tions in the charge to the jury unless the High Court can first hold that the verdict on the evidence is unreasonable and to that extent a reference by a Sessions Judge may prejudice an accused who would have been in better position if that Sessions Judge had convicted and the accused had appealed therefrom.

We do not think that the Full Bench intended to lay down anything more than that the verdict of the jury should not be set aside merely on the ground that the High Court should come to a different conclusion on the evidence as opposed to the alternate view that the verdict should be shown to be "perverse and manifestly unreasonable". If there are other grounds of illegality vitiating the verdict or the trial, the Full Bench decision does not preclude the High Court from doing justice or passing final orders as the circumstances require. The only question with which the Full Bench was concerned was the extent of interference where the attack on the verdict was based on the wrong appreciation of the evidence in the case.

The judgment under notice however proceeds on a literal reading of the words of S. 307 and the learned Judges hold that the High Court in dealing with references under S. 307 are not trammelled by the principles underlying S. 418 and S. 423 (2) of the Code dealing with criminal appeals. The distinction between the English jury system and the Indian jury system which is relied on, though true, does not really conclude the point nor is there any justification for the criticism that the previous decisions of the various High Courts did not appreciate the amplitude of the language of the Code. The Code uses the words "give due weight" and does not in that section give any further guidance The Courts have to gather the principles from the rest of the Code and the expression "due" is best understood in the light of the importance attached to a jury's verdict as provided for in other parts of the Code.

MEHR CHAND *v.* MILKHI RAM, I. L. R. 13 Lah. 618 (F. B.).

An auction-purchaser in execution of a money decree whose sale was confirmed and ~~who~~ was put into possession was subsequently dispossessed under a decree in a suit by a third person who had a paramount title. The judgment-debtor was found to have no saleable interest that could pass to the auction-purchaser. The Full Bench hold that in such circumstances the auction-purchaser could recover the moneys paid by him from the original decree-holder by a suit against him. The cause

of action is rested on the basis of "money had and received" as on a total failure of consideration. This view is opposed to the general trend of decisions in the other High Courts which hold that under the Code of 1908, the only right of the auction-purchaser is by an application under O. 21, R. 93 and that where this is not available, even the total absence of a saleable interest in the properties does not give a cause of action to the auction-purchaser. Under the Code of 1882, the Courts were holding that the law provided a remedy. It has been taken away under the new Code. The rule of "caveat emptor" is said to operate so as to deny any right to relief in such cases. If there were any fraud or such other conduct on the part of the decree-holder as would in law make it obligatory on him to refund the money it would be another matter but in the absence of such circumstances the mere discovery subsequently of a total want of saleable interest does not *per se* confer a right to obtain a refund of the auction amount. The decision under notice however specifically dissents from the above view and the learned Judges hold that there is nothing in O. 21, R. 93 which takes away any other right existing under the general law and that even S. 315 of the old Code of 1882 did not create a new right. According to this Full Bench, there is always a representation by the decree-holder and by the Court acting as his agent, that there is some kind of saleable interest in the properties although it is said there is no guarantee of its extent. It is difficult to hold that there is a warranty of title in Court sales to any extent. It is one thing to say that that there is a representation but this is quite different from a warranty.

JNANADASUNDARI SHAHA *v.* MADHABCHANDRA MALA, I. L. R. 59 Cal. 388.

In this case, the learned Judges have held that the rejection of a memorandum of appeal on the ground that the proper court-fee has not been paid on it and that the order of the Court calling for the additional court-fee has not been complied with is not a decree but only an order. It must be pointed out that the decision on this point is only *obiter*, as the learned Judges have proceeded on the view that under O. 7, R. 13 read with section 107, a new memorandum of appeal can be and was filed in the case under notice.

On the question whether the rejection of a memorandum of appeal stands on the same footing as the rejection of a plaint under O. 7, R. 11 read with section 2 (2) which expressly enacts the latter to be a decree within the meaning of the Code, the authorities of all the High Courts are uniform to the effect that it amounts to a decree. Reference may be made in this connection to the decisions in *Gulab Rai* v. *Mangli Lal*[1], *Rup Singh* v. *Mukhraj Singh*[2], *Raghunath Gopal* v. *Nilu Nathan*[3], *Gunga Dass Dey* v. *Ramjoy Dey*[4], *Rakhal Chandra Ghosh* v. *Ashutosh Ghosh*[5], *Ayyanna* v. *Nagabhooshanam*[6], *Zamindar of Tuni* v. *Bennayya*[7], *Surajpal Pandey* v. *Utim Pandey*[8] and *Gabba* v. *Kanchhadi Lal*[9]. In this connection, it is impossible to draw any distinction between the various sub-rules of O. 7, R. 11 in deciding whether a particular order amounts to a decree or not. It must also be noticed that the decisions in *Rakhal Chandra Ghosh* v. *Ashutosh Ghosh*[5], *Surajpal Pandey* v. *Utim Pandey*[8] and *Gabba* v. *Kanchhadi Lal*[9] are decisions under the Code of 1908 unlike the others which were given under the Code of 1882. The provisions of the new Code on this point have not made any substantial change from the old Code. Even as early as 1903, in *Saminatha Aiyar* v. *Venkatasubba Aiyar*[10], two learned Judges of the Madras High Court thought that the question was no longer one of first impression but covered by a series of decisions of the various High Courts, though they themselves were disposed to take a different view if they had to consider the point apart from authority. We venture to submit that in 1931 when the decision under notice was given, the question which is one of procedure should have been governed by the rule of *stare decisis* under the uniform current of decisions referred to above.

1. (1884) I. L. R. 7 A. 42.
2. (1885) I. L. R. 7 A. 887.
3. (1885) I. L. R. 9 Bom. 452.
4. (1885) I. L. R. 12 C. 30.
5. (1913) 17 C. W. N. 807.
6. (1892) I. L. R. 16 M. 285.
7. (1898) I. L. R. 22 M. 155: 8 M. L. J. 304.
8. (1921) 6 Pat. L. J. 625.
9. A. I. R. 1922 Nag. 62.
10. (1903) 13 M. L. J. 300.

H. V. LOW & CO., LTD. *v.* JYOTIPRASAD SINGH DEO, I. L. R. 59 Cal. 699 : 61 M. L. J. 699 (P. C.).

In this case, the plaintiffs had agreed to take a lease of mining rights in certain properties in a Zamindary and paid a premium under the agreement and there was a clause in the agreement that if the plaintiffs should neglect or fail to take the lease within a certain time, except for the reason of the want of the lessor's title to the properties, they should forfeit the premium paid to the Zamindar who was the defendant in the case. The plaintiffs' solicitors called on the defendant's manager to produce some documents of title, to show that certain grants made by the defendant's predecessors to third persons did not confer mining rights on the grantees; but the Zamindar could not produce the same. The plaintiffs consequently claimed to recover the premium paid. Their Lordships held, affirming the decision of the Calcutta High Court on the appellate side, that the plaintiffs had not shown a reasonable doubt as to the defendant's title and were therefore not entitled to recover the premium paid.

It is necessary to notice that, in this case, their Lordships have drawn a distinction in this respect between an agreement to sell and an agreement to lease based on the difference of the language in section 55, sub-section 1 (*a*) and (*b*) and section 55, sub-section (2) as contrasted with section 108-A (*b*) and (*c*) of the Transfer of Property Act and held that in the case of an agreement to lease there is no right in the proposed lessee to call for the production of documents of title from the lessor and that there is also no implied covenant as to the title in favour of the lessee available as against the lessor. In both these respects, as regards the case of vendors and vendees, the rights are clearly laid down in section 55, sub-section 1 (*a*) and (*b*) and sub-section (2); and the vendee has the right to call for the documents of title from the vendor and there is a covenant as to title to the property in the vendor and available to the vendee which also runs with the land. These questions are fully discussed by the Calcutta High Court in *Jyotiprasad Singh Deo* v. *H. V. Low & Co.*[1] with reference to the English law and the language of the sections of the Transfer of Property Act. Their Lordships' decision has the effect of upholding the view taken by the High Court in that case from which this appeal was taken to them.

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1. (1929) I. L. R. 57 Cal. 1189.

SIRAJ FATMA *v.* MAHMUD ALI, I. L. R. 54 All. 646 (F. B.).

The question in this case was as to whether a judgment is liable to be re-opened at the instance of a minor on his attaining majority on the ground that his guardian or his next friend was guilty of gross negligence in the conduct of the case. The precise facts would seem to raise a further question to which sufficient attention does not seem to have been paid, *viz.*, that assuming that a judgment is liable to be re-opened on that ground, whether that rule applied to the facts of the case. Those facts were:—In a partition proceeding before the Revenue Court, the guardian of the minor raised the appropriate defence, the result of which was he was asked to go to the Civil Court and have the question of title decided. The guardian did not do that and in that he was guilty of gross negligence. The Revenue Court proceeded to partition after the expiry of the time allowed. It was thus the failure to institute the suit that constituted the negligence on the part of the guardian and not anything done or omitted to be done in the course of the suit. Failure to appeal might afford a parallel. Failure to institute a suit to set aside an adverse order on a claim might have afforded another but for the fact that minority is an exemption under the Limitation Act. For aught one knows, it might be that the guardian had not the necessary funds or the *de jure* guardian did not supply the necessary funds (as it might well be that the guardian *ad litem* is not the guardian of the minor). It might be urged that that complication would only affect the finding of gross negligence and the conclusion arrived at is on the footing that there was gross negligence on the part of the guardian. In the case of ordinary appeals, the Limitation Act provides a remedy under S. 5. It is difficult to see how the judgment of the first Court can be impeached on the ground that the guardian did not file the appeal. The Lower Court had brought what light it was capable of to the decision of the question and that decision can in no sense be said to be affected by the negligence. Unless the peculiar division of functions between the Civil and Revenue Courts in the decision of not only suits but also questions arising in a suit that obtains in that part of the country is held to justify the looking upon the suit and the revenue proceedings, as a part of the same proceeding, in other words unless the failure of the guardian to file the

suit is assimilated to the failure to summon witnesses or to take other subordinate proceedings in a suit, it is difficult to justify the application of the rule to the facts of the case. It is quite another question whether there is a general principle that minority should extend the period of limitation in all cases, even apart from the special provisions of the Limitation Act. On that question there is some difference of opinion but the general trend of opinion is that there is no such general principle.

On the point discussed in the case, there is a cleavage of opinion, not that there is no remedy at all but some decisions hold that the only remedy is review so far as it goes, while others hold that review is not an adequate remedy and the remedy of a suit is available. The Judges that take the former view rely on S. 11 of the Civil Procedure Code and S. 44, Evidence Act, which show according to them that the only defences open to a person properly a party to a suit is fraud and collusion. But the whole question turns on as to when a minor can be said to be properly represented. Non-appointment of a guardian and improper appointment of a guardian, *e. g.*, of a person with adverse interest or one that is disqualified in law from acting as a guardian *ad litem* have been held to be cases of a non-representation and the minor in those circumstances is not barred by the proceeding. Grossly inefficient representation by the guardian appointed is though not fraud in the common law sense of the term, is fraud in the equity sense of it like undue influence, or failure of duty on the part of solicitor or other persons in fiduciary relationship owing a duty to the person concerned: *Nocton* v. *Lord Ashburton*[1], but apart from that, it is really a case of non-representation for representation in the case of minors means reasonably efficient representation and not mere representation on paper. . Failure on the part of the guardian to present certain points of view by reason of negligence on his part might be a ground for review even in the narrow sense in which "sufficient reason" has been understood but there may be other kinds of negligence than presentation of the proper view-point which may not come within the section as to review and the remedy is also conditioned by the *personnel* of the Court and a rule of limitation which no doubt is flexible by reason of S. 5

1. (1914) A. C. 932.

of the Limitation Act but even so, is much dependent on the discretion of the Court. In addition, in this particular case, review did not form part of the Revenue Court procedure. The large bulk of authority in India is in favour of the remedy of suit and we think, that both in view of the requirements of the case and on principle, that is the proper view to take.

NAWAL KISHORE *v.* SARJU RAM SAHU, I. L. R. 54 All. 774.

Having regard to the language of S. 55, Transfer of Property Act, cases in India have held that mere notice of defect in title is not sufficient to exclude the covenant for title. There must be an express "contract to the contrary": *Adikesavan Naidu* v. *Gurunatha Chetti*[1], *Arunachala Aiyar* v. *Ramaswamy Aiyar*[2], *Subbaroya* v. *Rajagopala*[3], *Thekkamannengath Raman* v. *Kakkasseri Pashiyot Manakkal Karnavan*[4] and *Vellayappa Rowthen* v. *Bava Rowthen*[5]. In connection with the vendor's lien the Privy Council had occasion to consider the significance of the expression "contract to the contrary" in *Webb* v. *Macpherson*[6] and their Lordships say "you have to find something, either express contract or at least something from which it is a necessary implication that such a contract exists" to exclude the statutory charge. In *Ganesh Lal* v. *Charan Singh*[7] their Lordships had to consider the effect of those words in S. 82 of the Transfer of Property Act. Their Lordships insist upon a special contract to exclude the benefit of the section. It is impossible to infer from mere knowledge of defect of title that the purchaser stipulates against the statutory assurance; for aught one knows, he might expect the vendor to further assure the title if an occasion arises for it, the transfer being only voidable at the instance of the other members.

AZIZ ULLAH KHAN *v.* COLLECTOR OF SHAHJAHANPUR, I. L. R. 54 All. 801.

This case lays down that the Court's powers of amendment are not restricted to errors that have crept in the judg-

1. (1916) I L. R. 40 Mad. 338: 32 M. L. J. 180 (F. B).
2. (1914) 27 M L. J 517.
3. (1914) I L R. 38 Mad. 887.
4. (1915) 28 M. L. J. 184.
5. (1915) 29 I. C. 747.
6. (1903) L. R. 30 I. A. 238: I. L. R. 31 Cal 5 : 13 M. L. J. 389 (P.C.).
7. (1929) L. R. 57 I. A. 189: I. L. R. 52 All. 355: 59 M. L. J. 177 (P.C.).

ment or decree but extend to errors that have crept in plaint, decree, sale certificate and Dakhalnamah: *Somasundaram Chettiar* v. *Rama Krishna Kakir Velasami*[1] and *Narayanasami* v. *Natesa*[2]. A recent case in Madras, *Latchayya* v. *Seethamma*[3], would seem to recognise the power of the Court to amend a decree as consequential upon the rectification of the mortgage forming the basis of the decree provided, of course, the third parties' rights have not intervened or the principle of *Marriot* v. *Hampton*[4] does not prohibit it. This is in principle to go back to a period antecedent to the plaint but it is only in one sense so. The error is in the decree—the inducing cause of the error being the error in the document. The subsequent rectification does not rectify the contract but only the expression of it so that the thing that justifies the amendment is a thing that existed at the date of the plaint as well as since though ascertained at a later date.

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1. (1914) 22 I. C. 774.
2. (1892) I. L. R. 16 Mad. 424.
3. (1931) 62 M. L. J. 350.
4. (1797) 7 T.R. 269: 101 E.R. 969.

NAGENDRANATH DE *v.* SURESH CHANDRA DE, L. R. 59 I. A. 283: I. L. R. 60 Cal. 1 : 63 M. L. J. 329 (P. C.).

The late Mr. Mitra in the opening of his commentary to clause (2) of Art. 179 of the Limitation Act of 1877, which corresponds to clause (2) of Art. 182 of the present Limitation Act, observed that the meaning of the words "where there has been an appeal" in the clause has been the subject of several inconsistent decisions and the learned editors of the latest edition of the work have seen no reason to alter it as the conflict has only become more accentuated in the course of years. This decision of their Lordships being the pronouncement of the highest tribunal has set at rest much of the conflict on the point and rendered reference to the older decisions useless. Indeed, their Lordships say, in so many words, that nothing would be gained by discussing those varying authorities in detail and proceed to give effect to the plain words of the statute, sweeping away all the artificial distinctions that have been imported into the matter without any warrant.

After this pronouncement, once there has been an appeal presented against a decision, the circumstance that the appeal is incompetent or that all or any of the parties to the execution are not made parties to the appeal or that the proper Court-fee has not been paid on the memorandum of appeal or that the decree is only from a part of the decree or that it does not imperil the portion of the decree sought to be executed, is immaterial and time will nevertheless run for the purpose of execution from the date of the final decree or order of the appellate Court. This gives full effect to the language of the article of the Limitation Act and is in accord with the decision of the Full Bench of the Madras High Court in *Kristnama Chariar* v. *Mangammal*[1] if reference to it is permissible.

A reference to the facts of the case under notice may be made to clear up the limits of the decision. There were several co-mortgagees who had obtained a preliminary decree on the mortgage ; and some of the co-mortgagees claimed to have acquired the rights of some others also and applied for a final decree including their rights as well. A judgment was given which gave the decree-holders rights only in respect of their own original shares but denied the right by assignment of the

1. (1902) I. L. R. 26 Mad. 91 (F. B.).

shares of the others. The final decree pursuant to this was not drawn up till some time later. An appeal was filed after the decree was drawn up against the decision by the applicants for final decree styling it as an appeal against an order apparently to save Court-fees on the allegation that no decree had been drawn up, against the co-mortgagee decree-holders alone claiming right to their shares also but not making the judgment-debtors parties to the appeal. This appeal was apparently dismissed among other grounds for the reason that the appeal should properly have been against the decree and not merely against the order as it was styled. Subsequently the other mortgagee decree-holders whose shares were claimed by assignment sought to execute the decree against the judgment-debtors who were not made parties to the appeal and their Lordships held that time for execution ran from the appellate Court's decision. It may be noticed that, on these facts, there was no appeal against the final decree which was sought to be executed but only what purported to be on appeal against an order of the first Court prior to the drawing up of the decree. But their Lordships have apparently treated it as in substance against the decree itself which was sought to be executed. Otherwise the class of cases dealing with the question whether the appeal contemplated by clause (2) should be only against the decree or order sought to be executed or not, would have come up for review. On this question again there is conflict among the decisions in India. Cf. *Somar Singh* v. *Deonandan Prasad Singh*[1] and *Narsingh Sewak Singh* v. *Madho Das*[2] on the one hand and *Ahammad Kutty* v. *Kottakkat Kuttu*[3] and *Fakir Chand Mandal* v. *Daiba Charan Parnit*[4] on the other.

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1. (1927) I. L. R. 6 Pat. 780.
2. (1882) I. L. R. 4 All. 274.
3. (1932) 64 M. L. J. 251.
4. (1927) I. L. R. 54 Cal. 1052.

HANSRAJ GUPTA *v.* ASTHANA, I. L. R. 54 All. 827: 63 M. L. J. 859 (P. C.).

In this case, their Lordships carry the principle that S. 156 of the Companies Act creates a statutory liability, a liability *ex lege* as distinguished from liability *ex contractu* under the contract for allotment or purchase of shares, to its logical conclusion and hold that if a man's name is on the register of shareholders with his knowledge and consent during the period contemplated by that section, his liability is absolute though he may be able to show that the contract is void or illegal. It would be otherwise if his name was without his consent, as for instance, if there was mistake as to the identity of the company, *International Societies of Auctioneers and Valuers*, In re[1], or there was no concluded contract at all, *Scottish Petroleum Co.*, In re[2]. If the contract is only voidable, if he commences proceedings before the commencement of the winding up, he is protected, not otherwise. Their Lordships hold in this case that the mere fact that the contract is void as contravening S. 105 of the Companies Act is not sufficient to protect if the name was placed with his knowledge and consent. Some other questions arose in the case—one under S. 105 of the Companies Act and the other as to when limitation commences for an application to rectify the list of contributories. On the latter point the Allahabad High Court had held that though the notice after the list of contributories was finally prepared was not served and according to the rules such notice was the starting point, the fact that the party appeared before the list was finally prepared and had knowledge of such preparation made a difference. Their Lordships were not prepared to accept that conclusion. Their Lordships were also not prepared to accept the position that an agreement to give a person taking large shares, option to give credit to the balance of share amount in the price of goods to be ordered from him on certain advantageous terms contravened S. 105 of the Companies Act.

JAI DALAL MADAN GOPAL, *In the matter of*, I.L.R. 54 All. 846.

In this case, following certain other judgments of the Calcutta and the Allahabad High Courts, their Lordships hold

1. (1898) 1 Ch. 110. 2. (1882) 23 Ch. D. 413.

that a partnership as such cannot be a member of another partnership though Sir Sulaiman, C. J., was personally inclined to take a different view. These cases do not seem, however, to have taken note of the judgment of the Privy Council in *Sathappa Chetti* v. *Subramanian Chetti*[1], where the very point arose for consideration and the Privy Council affirmed the judgment of the High Court holding that there could be a "superior partnership of which an individual was one side and the whole firm as a unit was the other side" and in that view their Lordships hold that in an internal suit between the members of the unit which formed the partnership with him, the other was not a necessary party. A different view has been taken in connection with the Companies Act by the Privy Council in *The Firm of Senaji Kapurchand* v. *The Firm of Pannaji Devichand*[2], upholding the view of the Madras High Court in *The Firm of Pannaji Devichand* v. *The Firm of Senaji Kapurchand*[3]. The Contract Act and the Companies Act do not seem to be *pari materia*. While it must be inconsistent with the object of S. 4 of that Act to admit association of persons as units there is no such inconsistency with the object of the Indian Contract or the Patnership Act. The implication of an association being admitted as a partner would be that the representatives of the association would be entitled to function in the partnership as partner.

1. (1927) 53 M. L. J. 245 (P. C.). 2. (1930) 59 M. L. J. 435 (P. C.).
3. (1926) I. L. R. 50 Mad. 175; 51 M. L. J. 667.

RASUL BAKHSH *v.* MST. BHOLAN AND OTHERS, I. L. R. 13 Lah. 780.

This is an interesting decision. The Privy Council held in *Rashid Ahmad* v. *Musammat Anisa Khatun*[1] that an oral pronouncement by a Sunni Mahomedan of the Hanafi sect of the relevant words operates as a valid and effective divorce even though there was a mental observation that it should not be a genuine divorce. The judgment under notice, however, distinguishes that case on the ground that the Mahomedan Law relating to the effectiveness of a written divorce is different. The Mahomedan Jurists distinguish between 'customary' writing and 'unusual' writing and also between writing which is 'manifest' and which is 'not manifest'. Where the document is not written and superscribed in the usual form the absence of an intention to divorce will prevent the document from having effect. On the facts it was found that the husband had no intention to effect a divorce and it was accordingly held that the marriage relationship did not validly terminate.

JHANDA SINGH *v.* GULAB MAL-BHAGAWAN DAS, I. L. R. 13 Lah. 788.

A suit for a declaration that a decree is not binding on the plaintiff and for an injunction restraining the defendant from executing it will come under S. 7, cl. (*iv*) (*c*) of the Court-Fees Act. In such cases the preponderating view is that the plaintiff is entitled to put his own valuation which the Court is not entitled to object to and *ad valorem* court-fee is payable thereon. In Madras the amending Act V of 1922 has changed the law. In the absence of any such provision, the Lahore Court has held that the plaintiff's valuation though arbitrary is final and the value for purposes of jurisdiction also is the same.

DEBI PRASAD PANDEY *v.* GAUDHAM RAI, I. L. R. 11 Pat. 772.

After the amendment of S. 98, Civil Procedure Code, by Act XVIII of 1928, the relevant provisions of the Letters Patent alone govern the procedure when there is a difference of opinion between two or more Judges of a Chartered High Court even when the appeal is one from a Subordinate Court under the Civil Procedure Code. It is only if the Letters Patent do not contain any provisions regulating the procedure or when there are no Letters Patent as in the case of non-chartered High

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1. (1931) L. R. 59 I. A. 21: I. L. R. 54 A. 46: 62 M. L. J. 405 (P.C.).

Courts that S. 98, Civil Procedure Code, will apply. The conflict that prevailed among the High Courts prior to the amending Act is expressly set at rest by the intervention of the Legislature. A Full Bench of the Madras High Court had exhaustively considered the matter. See *Dhanaraju* v. *Balakissendas Motilal*[1]. The Patna Court also agrees with this view and has expressly followed the Madras Full Bench.

SITAL PRASAD SHUKUL *v.* BABU LAL SHUKUL, I. L. R. 11 Pat. 785.

An application for transfer of a decree to another Court for execution is a step-in-aid of execution under Art. 182, cl. (5) of the Limitation Act, but it must be "in accordance with law" to save limitation. The Patna Court has held in the above case that an application to transfer a Sub-Court decree to the District Munsiff's Court for execution is of no avail as under the rulings of that Court the Munsiff is not competent to execute the decree. The Madras Court has always held that in such circumstances there is jurisdiction in the Munsiff's Court but the other Courts take a different view. The fact that no comment on such procedure was made by the Privy Council in *Maharajah of Bobbili* v. *Sri Raja Narasaraju*[2] is perhaps significant, as the view that the transfer is invalid may well sustain the legality of the application to the District Court as a proper application to the proper Court.

BASHIST NARAIN SAHI *v.* SIA RAMCHANDRA SAHI, I. L. R. 12 Pat. 18.

The learned Judges had not at the time of their decision the benefit of the exposition by the Judicial Committee of the true scope and meaning of S. 124 of the Indian Succession Act in their recent decision in *Indira Rani Ghose* v. *Akhoy Kumar Ghose*[3]. Adopting the principle of that decision, the death of the legatee without issue refers, in the circumstances, to the contingency of his leaving no issue, he having first taken the properties under the will. So interpreted, there is a valid gift over to the deities under the terms of the will. As explained by the Privy Council, S. 124 cannot apply where a period is specified in the will itself as the period within which the contingency is to happen. The decision would have been the other way if the Privy Council decision is applied properly.

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1. (1929) I. L. R. 52 Mad. 563: 57 M. L. J. 264 (F. B.).
2. (1916) L. R. 43 I. A. 238: I. L. R. 39 Mad. 640: 31 M. L. J. 300 (P. C.).
3. (1932) 64 M. L. J. 48 (P. C.).

SHANMUGASUNDARA MUDALIAR *v.* RATNAVELU MUDALIAR, I. L. R. 55 Mad. 1025: 63 M. L. J. 383.

The principle on which restitution in the case of reversal of decrees proceeds is, according to Lord Cairns in *Rodger* v. *The Comptoir d'Escompte de Paris*[1], the well-recognised principle that the act of Court should not be allowed to injure anybody and if that is the right principle (though no doubt the wrongful gain made by the other side cannot be altogether ignored), the true question is the extent of the injury caused by the Court's act and the party injured would be entitled to compensation therefor though it may be the other side is not proportionately benefited. In this case, the money under decree had been deposited but the other side could not take it away as he was unable to furnish security as directed by the appellate Court. Nevertheless, their Lordships held that the other side was bound to pay interest. Acting on this principle the Court allowed interest for the whole period money was lying in Court in *Dalu Ram* v. *Ramanand*[2], and in some other cases, acting on the same principle the Court has allowed a higher rate of interest than the Court rate. The fact that the inconvenience was invited by the judgment-debtor by an application for stay did not, according to their Lordships, make any difference. The decree-holder not having disclaimed intention to execute and the order complained against having been made in his presence their Lordships hold that he must take the consequence. It would not have mattered, even if the judgment-debtor had paid the money into Court before any application was made by the decree-holder the existence of the decree being sufficient compulsion to justify such payment.

VENKATACHALA CHETTY *v.* RAMASWAMI SERVAI, I. L. R. 55 Mad. 352 (F. B.).

RAJAH OF KALAHASTI *v.* JAGANNADHA RAYANIMGAR, I. L. R. 55 Mad. 1006: 63 M. L. J. 827.

After a temporary disturbance caused by *Palaniappa Chettiar* v. *Valliammai*[3], the *status quo ante* has been restored by the Full Bench in the first of the cases under review which holds that the legal representatives of a deceased decree-holder

1. (1871) L. R. 3 P. C. 465. 2. A. I. R. 1929 Pat. 593.
3. (1926) I. L. R. 50 Mad. 1; 51 M. L. J. 745.

can continue an application for execution presented by the latter. The same reasoning would apply to the case of judgment-debtors. There is some difficulty as to the proper article of limitation applicable to such a case. The suggestion in the Full Bench case is that Art. 181 might apply, Art. 176 being inapplicable by its language to the case of decree-holder's representative. The same difficulty, as pointed out in the latter case, does not exist in the case of the appellant and respondent in appeals from orders in execution and Arts. 176 and 177 could be applied without any violence to the language of the articles. Undoubtedly the provisions of the Code relating to death of parties after decree are confusing and the Rule Committees might well apply themselves to the task of unravelling the tangle. The confusion is thickened in the case of transfer of decrees for execution but gradually the law is getting clarified —not the least important factor in the process being the pronouncement of their Lordships of the Privy Council in *Jang Bahadur* v. *Bank of Upper India, Ltd.*[1] Their Lordships' solution is that the Court to which the decree is transferred does not lose jurisdiction by the fact of death but that before execution is proceeded with, the decree-holder must get an order for substitution from the Court which passed the decree. This, no doubt, would prevent the defeating of the decree-holder in the case of pending applications. But the same principle has been applied by the Calcutta High Court in *Manorath Das* v. *Ambika Kanta Bose*[2], *Monmotho Nath Mitter* v. *Rakhal Chandra Tewary*[3] and *Salendra Nath Ghose* v. *Surendra Nath De*[4], to cases of fresh presentation of execution petitions. Their Lordships hold therein that the representatives may apply for execution to the transferee Court and at the same time apply for substitution to the Court which passed the decree and when the order for substitution is made the order will retroact and validate the execution application from its very inception. There is no reason why the same principle should not apply to the case of a judgment-debtor dying as well.

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1. (1928) L. R. 55 I. A. 227: I. L. R. 3 Luck. 314: 55 M. L. J. 545 (P.C.).
2. (1909) 9 Cal. L. J. 443.
3. (1909) 10 Cal. L. J. 396 at 400.
4. (1929) 34 Cal. W. N. 437 at 439.

MAHOMMAD ASLAN KHAN *v.* MIAN FEROZE SHAH, L. R. 59 I. A. 386: I. L. R. 13 Lah. 687: 63 M. L. J. 694 (P. C.).

A decree for specific performance under S. 27, cl. (*b*) of the Specific Relief Act should be not only against the original contracting party but also against the subsequent transferees where they are not transferees without notice of the original contract. The conveyance ought to be by all of them. The plaintiff should ask for and obtain relief against the transferees also.

The subsequent transferees cannot resist specific performance, even if they had only constructive notice of the agreement. Actual notice is not essential. In the particular case under notice, their Lordships observe "that the original owner's dealings with his property which were undoubtedly known to the subsequent transferees were such as to put the latter upon enquiry and that if reasonable enquiries had been made by them they ***must have become*** aware of the prior agreement for sale and they could not therefore predicate of themselves that they were transferees without notice of the original contract as required by S. 27 (*b*) of the Act". It may also be noted that their Lordships allow the plaint to be amended by the insertion of a prayer for mesne profits also in the same plaint which prays for specific performance.

QADIR BAKHSH *v.* HAKAM, I. L. R. 13 Lah. 713 (F. B.).

This Full Bench decision deals exhaustively with a question of frequent occurrence on which, however, there has been a divergence of judicial views. Where a grantor alleges that a transaction apparently real was actually fictitious and was for the purpose of effecting a fraud and that the fraud was completed, can he be permitted in a Court of law, as a defendant, in possession, to say that the transaction was other than what it appears to be? Is there a distinction in such cases between the case of a plaintiff and a defendant? The Full Bench holds that, in such circumstances, the plea is open to the defendant to show the real nature of the transaction, and this is allowed not on the ground of favouring the defendant as such but as an exception, based on true grounds of public policy, to the maxim that no man alleging his own baseness ought to be heard (*Nemo allegans turpitudinem suam audiendus est*). The Calcutta, Allahabad and Lahore Courts have all along been holding this

view. But the High Courts of Bombay and of Madras have taken a different view in more recent decisions though the earlier view of those Courts also agreed with the Calcutta view. The maxim of law *"In pari delicto potior est conditio possidentis"* is the governing rule and it ought to prevail over the other maxim, where the fraud is carried out. In cases where the fraud is not carried out, it is now settled by the decision of the Privy Council in *Pethaperumal Chetty* v. *Muniandy Servai*[1] that there is a *locus poenitentiae* given to one or other of the parties. The leading judgment of the Bombay High Court which is responsible for the view that the party who *first* sets up the alleged fraud should fail whether as plaintiff or defendant, is that of Sir Lawrence Jenkins in *Sidlingappa* v. *Hirasa*[2]. This view is, however, subjected to a very critical examination by Justice Mukerjee in *Raghupati Chatterjee* v. *Nrishingha Hori Das*,[3] where he traces the evolution of the doctrine and points out how the later decisions of English Courts and the Courts of the United States of America have modified the rigour of the old decisions and have now settled upon a more severely just and true basis of law to meet such cases. The present Full Bench decision also points out how the Bombay judgment is based on old English decisions which have been modified by the later rulings and how these have not been considered by that judgment as indeed the earlier decision to the contrary of Sir Michael Westropp, C. J., in *Luckmidas Khimji* v. *Mulji Canji*[4]. The later Madras rulings have simply followed the Bombay judgment and have not examined the matter independently. As there are earlier decisions to the contrary it cannot be taken that the law is settled and the question may have to be examined afresh by a Full Bench wherever it arises. Attention may, in this connection, be drawn to the arguments reported in *Ma Ngwe Naing* v. *Maung Tha Maung*[5] where a similar question was raised before the Privy Council which, however, the Committee found it unnecessary to decide.

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1. (1908) L.R. 35 I. A. 98: I.L.R. 35 Cal. 551: 18 M.L.J. 277 (P. C.).
2. (1907) I.L.R. 31 Bom. 405.
3. (1923) 71 I.C. 1: A I.R. 1923 Cal. 90.
4. (1881) I.L.R. 5 Bom. 295.
5. (1928) I.L.R. 7 R. 4: 56 M.L.J. 244 (P.C.).

MOTIRAM ROSAN LAL COMPANY, LTD. v. COMMISSIONER OF INCOME-TAX, I.L.R. 12 Pat. 12.

The learned Judges in this case prefer to follow the Bombay Court in holding that the words "original cost to the assessee" in S. 10, cl. (2) (*vi*) of the Indian Income-tax Act (as regards the depreciation allowance on buildings, plant and furniture) means the actual genuine cost to the assessee who is being taxed and not the cost to his predecessor. They specifically dissent from the view of the Madras High Court in *Commissioner of Income-tax, Madras* v. *Messrs. Massey & Co., Ltd., Madras*[1]. It may be pointed out however that the Madras case deals with a case of a continuing business where there is a succession while in the Bombay decision, *Commissioner of Income-tax* v. *The Sarasapur Mills Company, Ahmedabad*[2], the assessee did not buy any existing business as such including its plant and machinery but was merely the purchaser of second-hand plant and machinery, the property of a Company in liquidation. The Bombay decision is therefore distinguishable. The real question is as to the meaning of the term "assessee" in the case of a succession as under S. 26 of the Act. Does the word mean "the person by whom income-tax is payable" [definition in S. 2, cl. (*g*)], or having regard to the subject or context, the original purchaser of the buildings, plant or furniture, etc., where the business is transferred to the new assessee. The question is not approached from this point of view in the decision under review. While no doubt there are obvious differences of language between the Indian Act and the English Act and also the principle of depreciation allowance is a fixed percentage in the Indian Act while it is based on "wear and tear" under the English Act, are the differences so material as to affect the construction of the Act? The benefit of the unexhausted depreciation allowance is held not to be personal under the English Law and if this is the view in Indian law also, it is certainly just and proper to hold that the cost in relation to which the fixed allowance is granted for depreciation should be the cost to the original purchaser and not the cost to the successor in business though he is the assessee. If, on the other hand, a literal interpretation of the term is preferred it would not only curtail and confine the benefit of proviso (2) to

1. (1928) 56 M. L. J. 451 (F.B.). 2. (1931) I. L. R. 56 Bom. 129.

previous unexhausted depreciation allowance of the particular assessee but it would negative the benefit of the allowance itself in a case where there is a testamentary or intestate succession to a business as such. In such cases the cost to the actual assessee is *nil*. The Patna Court itself had held in *Maharajadhiraj of Darbhanga* v. *The Commissioner of Income-tax*[1] that a transfer of ownership of an existing business by operation of law is a succession within the meaning of S. 26, cl. (2). The Act does not impose an assessment on any person with respect to the income of a dead person to whom he has succeeded, where there has been no assessment made on such person during his lifetime. It may be that where an existing business is not continued as such by an heir, he may not be liable to be taxed under S. 26 of the Act. Where he inherits a business also as a capital asset, and elects to carry it on as a going concern, the policy of the Act seems to be to follow the business in the hands of the successor also. It would seem, therefore, the policy of the Act is better served by the view that commended itself to the Madras Court.

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1. (1932) I.L.R. 12 Pat. 5.

QASIM HUSAIN BEG *v.* KANIZ SAKINA, I. L. R. 54 All. 806.

In *Abi Dhunimsa Bibi* v. *Mahammad Fathi Uddin*[1] it was held that right to act in the matter of the dower reserved to a Mahomedan minor who has attained the age of majority according to Mahomedan law but not the age required by the Majority Act does not include the right to relinquish the right to dower which has already accrued. In this case, there was the further complication that the relinquishment of the dower took place as a consideration for the *Khula* or divorce from the husband which is also a matter in which a Mahomedan minor is entitled to act. Their Lordships dissent from the Madras view and hold that whether in settling the dower or in relinquishing it, the minor is acting in the matter of the dower within the meaning of S. 2 of the Act. One feature to be noticed is that the legislature did not regard acting in the matter of the marriage as including the dissolution of marriage, divorce being separately provided for. Again, dower is a part of the marriage contract and if such a wide construction was intended, that need not have been separately provided for. Again, such a wide construction might justify relinquishment of other rights than rights under a contract of dower—contractual rights and rights in immoveable property. It could hardly have been intended that in all these matters the minor should have a free hand. We rather think that as held in *Abi Dhunimsa Bibi* v. *Mahammad Fathi Uddin*[1] what is intended is—that in those specific matters alone, *viz.*, marriage, dower, divorce and adoption, the minor is entitled to act and not in collateral matters nor matters connected therewith but not as an integral part thereof. Marriage settlement may usually accompany marriage but is not an integral part of marriage and will not come within the rule. Some arrangements are usually made at the time of adoption but they will not bind a minor unless the guardian is a party to it.

SARABDEO BHARTHI *v.* RAM BALI, I. L. R. 54 All. 909.

Whether the decision of the Privy Council in *Mahanth Ram Charan Das* v. *Munshi Naurangi Lal*[2] governs cases of aliena-

1. (1917) I. L. R. 41 Mad. 1026: 35 M. L. J. 468.
2. (1933) L. R. 60 I. A. 124: I.L.R 12 Pat. 251; 64 M. L. J. 505 (P.C.).

tion by temple managers is not quite clear though reference in the judgment to *Velu Pandaram's case*[1] (which is the case of an alienation by the manager of a temple *kattalai*) might point to its being considered equally applicable to temple managers but it is quite certain that the decision under review cannot be good law after that decision. Their Lordships make it clear that the decision in *Vidya Varuthi* v. *Balusami Aiyar*[2] applies to all cases of alienations by matadhipathis whether the property vests in the idol or the mutt (in that case the finding was that the property vested in the idol) and equally whether the alienation is by way of lease or is an out and out alienation. They distinguish *Gnanasambanda* v. *Velu Pandaram*[1] and *Damodar Das* v. *Lakhan Das*[3] as cases of alienation of both the office and the property to which they hold the ruling would not apply and they distinguish *Subbaiya Pandaram* v. *Mahamad Mustapha Maracayar*[4] as a case of alienation by the trustee of a charity to which case also, their Lordships hold the ruling would not apply.

In the matter of AN ADVOCATE, I. L. R. 54 All. 912.

In this case a Special Bench of the Allahabad High Court held following In re *Wallace*[5] that false allegations in an application involving imputation of unfairness and impartiality to the Judges in connection with his case by an advocate acting in his individual capacity as a suitor and not as a professional man will not justify disciplinary action under the Bar Councils Act but that it is a matter for action by way of contempt. The converse, *viz.*, that if the contempt was in connection with the matter in which he acted in his professional capacity, he could be dealt with professionally is laid down in In re *Sashi Bhushan Sarbadhicary*[6]. The Courts have recently taken rather wide power in dealing with advocates and pleaders professionally for their private conduct. *Shankar Ganesh Dabir* v. *Secretary of State for India*[7]. That is on the ground that

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1. (1899) L. R. 27 I. A 69: I. L. R. 23 Mad. 271. 10 M L. J. 29 (P.C.).
2. (1921) L. R. 48 I. A. 302: I. L. R 44 Mad 831: 41 M L. J. 346 (P.C.).
3. (1910) L. R. 37 I. A. 147: I. L R 37 Cal. 885: 20 M. L. J. 624 (P. C.).
4. (1923) L. R. 50 I. A. 295: I. L R. 46 Mad. 751: 45 M. L. J. 588 (P. C.).
5. (1866) L. R. 1 P. C. 283.
6. (1906)) L. R. 34 I. A. 41: I. L. R. 29 All. 95: 17 M. L. J. 74 (P. C.).
7. (1922) L. R. 49 I. A. 319: I. L. R 49 Cal. 845: 44 M. L. J. 32 (P. C.).

the conduct is such as to render the pleader unfit to continue a member of the profession. Even in the case of contempt by an advocate in his individual capacity as a suitor, if the conduct involved moral turpitude of a character which "rendered him improper to remain as a practitioner of the Court," he might be dealt with professionally. In re *Wallace*[1].

KISHORI LAL *v.* BALKISHAN, I. L. R. 54 All. 824.

CHOCKALINGA *v.* PALANIAPPA, I. L. R. 55 Mad. 960: 63 M. L. J. 689.

Both these cases deal with the conditions of transfer under S. 24, Civil Procedure Code. The first deals with the case of transfer to a Court not having territorial jurisdiction but otherwise competent to deal with the case. The second with the case of transfer from a Small Cause Court to a Court not having Small Cause jurisdiction but competent to deal with it, if there was no Small Cause Court. It was held in both the cases that the transfer was good. On both the points there has been considerable divergence of opinion. *Ram Das* v. *Habib-Ullah*[2] and *Shaikh Jannat Hussain* v. *Shaikh Gulam Kutubuddin Ahmad*[3] sound a different note on the first question. *Murugesa Mudaliar* v. *Davva Venkata Kesavalu Chetty*[4] on the second. The section as it stood in the Code of 1882 permitted transfer to any Court "competent to try the same in respect of its nature and the amount or value of its subject-matter". In the Code of 1908, the words "in respect of its nature and the amount or value of its subject-matter" have been deleted giving some support to the view that territorial jurisdiction also is a condition. *Per contra,* both the cases place considerable reliance on the construction put upon the same words in S. 11, Civil Procedure Code, and the context. Those words have not precluded the Courts from holding a decision *res judicata* either because the Court had no territorial jurisdiction or because the Court where the decision is pleaded is a Small Cause Court while the decision that is pleaded was passed by a Court of original jurisdiction. The same importance is not attached to territorial competency by the Civil Procedure Code

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1. (1866) L. R. 1 P. C. 283 at 295.
2. (1931) I. L. R. 53 All. 916.
3. (1920) 5 Pat. L. J. 588.
4. (1929) 56 M. L. J. 649.

as to pecuniary competence or competence in respect of the nature of subject-matter. Mr. Justice Pandalai bases an argument on the clause under which the Court to which a Small Cause suit is transferred is deemed to be a Small Cause Court. The argument based on the context is also not without weight seeing that the usefulness of the section would be reduced to the utmost if it is confined to transfer to Courts with territorial jurisdiction or Small Cause jurisdiction as the case may be.

SRI ISWARANANDA BHARATHI SWAMI *v.* HINDU RELIGIOUS ENDOWMENTS BOARD, MADRAS, I. L. R. 56 Mad. 40: 63 M. L. J. 254.

The questions that come before the Board under S. 84 of the Madras Hindu Religious Endowments Act are of great private importance; it is really a gross and wholly unwarranted interference with private rights that the legislature has been guilty of in depriving the subject of the ordinary right of appeal from the decision of the District Court in such cases and the only explanation therefor is to be found in the irresponsibility of the Indian legislatures in their new-born legislative enthusiasm. If, in addition to it, the question of taking evidence should be left to the discretion of District Judges (the matter is being dealt with summarily and in a manner wholly out of proportion to the importance of the issues involved) the situation would have become intolerable. It is a relief to find that the learned Judges have found it possible to hold on a construction of the confused provisions of the Act in favour of the right of the subject to adduce evidence in support of his claim.

MAHANTH RAM CHARAN DAS *v.* MUNSHI NAURANGI LAL AND OTHERS, L.R. 60 I. A. 124: I.L.R. 12 Lah. 251: 64 M. L. J. 505 (P. C.).

The Indian Courts have had great difficulty in reconciling the decisions of the Judicial Committee in *Gnanasambanda Pandarasannadhi* v. *Velu Pandaram*[1] and *Damodar Das* v. *Lakhan Das*[2] on the one hand with the decision of the Board in *Vidya Varuthi's case*[3]. The dictum of Earl Buckmaster in *Subbaiya Pandaram* v. *Mahamad Mustapha Maracayar*[4] rather added to the difficulty. Since then various attempts to evolve a consistent principle have been made by several judgments of the High Courts but there has been no unanimity of views. The apparent conflict between the two types of decisions has been recognised by the Board itself and when the question came before it in *Lal Chand Marwari* v. *Mahant Ramrup Gir*[5] their Lordships did not solve the difficulty but contented themselves with reserving their considered opinion for a future occasion. The present case, one should have thought, gave the Board the needed opportunity to make a full and exhaustive statement on the points which have been agitated in the Indian Courts. The judgment of the Board however does not go far enough. The attempted distinction between alienations by way of leases permanent or otherwise and sales or mortgages is definitely rejected. The series of decisions of the Patna and Calcutta Courts sounding in that direction are no longer good law. The distinction between cases where the title is in the institution and where it is in the Mahant, is again rejected. The other points of controversy still remain. Their Lordships do not say under what circumstances the possession of the alienee is not adverse during the tenure of the office of the alienor. In cases of mutts, the Board is of opinion that the alienation is good for the tenure of office of the alienor. The governing principle no doubt is the alienation is not adverse during the limited period for which it is good under the law whatever its purported duration may be. But what are the tests for applying for how long the alienation is good? It is far from clear whether the Board intends to lay

1. (1899) L. R. 27 I. A. 69: I. L. R. 23 Mad. 271: 10 M. L. J. 29 (P. C.).
2. (1910) L. R. 37 I. A. 147: I. L. R. 37 Cal. 885: 20 M. L. J. 624 (P. C.).
3. (1921) L. R 48 I. A. 302: I. L. R. 44 Mad. 831: 41 M. L. J. 346 (P. C.).
4. (1923) L. R. 50 I. A. 295: I. L. R. 46 Mad. 751: 45 M. L. J 588 (P. C.).
5. (1925) L. R. 53 I. A. 24: I. L. R. 5 Pat. 312: 50 M. L. J. 289 (P. C.).

down that in all cases of mutts, the head for the time being has the power under the law to make an alienation which is good for the tenure of his office. In almost all mutts it is generally true that by the usage of the institution the head of the mutt has a sort of beneficial interest in the income which is primarily charged for the well-established purposes of the mutt. In the case of temples, on the other hand, the trustee as such has, generally speaking, no such rights although there are several cases in South India where the same person is both a trustee and an archaka, doing the duties of both and appropriating the residue of the surplus income, after providing for the worship of the deity, to his own support. Is the existence of the beneficial interest in the surplus income the real test? The view of the Madras High Court in several cases is in this direction. Their Lordships do not give the lead so clearly as one might wish. Again the way in which their Lordships distinguish *Velu Pandaram's case*[1] is somewhat cryptic. It is not clear if even in cases of temples and secular charities the alienation of some or more of the properties of the endowments (not involving the alienation or partition of the office), can be regarded as not in itself making the possession under it adverse from that date itself.

It may perhaps be useful to note that the judgment under notice does not necessarily establish that even the head of a mutt has any uncontrolled discretion in the enjoyment of the surplus income during his tenure of office. It only involves the acceptance of the position that he has enough beneficial interest to sustain the permissive character of the possession of the alienee during the limited period for which the alienation can be good in law. The observations in the judgment are from the point of view of the question of limitation only.

This judgment also approves of the view that a *de facto* trustee of a temple or a mutt can recover possession of its properties from a trespasser for and on behalf of the trust.

[END OF VOL. LXIV.]

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1. (1899) L. R. 27 I. A. 69; I. L. R. 23 Mad. 271; 10 M. L. J. 29 (P. C.).